No. 76-43

In the Supreme Court of the United States

OCTOBER TERM, 1976

CITY OF PHILADELPHIA, ET AL., PETITIONERS

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners, the City of Philadelphia and a black civilian employee of the Frankford Arsenal (located in Philadelphia), filed this action in the United States District Court for the Eastern District of Pennsylvania, seeking declaratory and injunctive relief to prevent respondents, the Secretary of Defense and the Secretary of the Army, from effectuating their decision to close the Frankford Arsenal. On November 22, 1974, the Secretary of Defense had announced 111 separate base closure and realignment actions. One of these actions was the phased closure of the Frankford Arsenal, which will result in the transfer or reduction-in-force of approximately 3,500 civilian jobs. The announced justification for the closure was that it was necessary as an economy measure.

Petitioners contended that the closure decision violated the equal employment opportunity policies contained in Executive Order 11478 and the Equal Employment Opportunity Act of 1972, 42 U.S.C. (Supp. V) 2000e-16, and the provisions of the Arsenal Act, 10 U.S.C. 4532.

The district court dismissed petitioners' complaint, holding that petitioners had failed to state a cause of action and that the court lacked jurisdiction (Pet. App. 1C-9C). The court of appeals affirmed. Without reaching the issues of sovereign immunity, standing, failure to exhaust administrative remedies, and the authority of a city to sue *parens patriae*, the court of appeals held that the district court lacked jurisdiction over petitioners' civil rights claim and that petitioners' Arsenal Act claim failed to state a cause of action (Pet. App. 1B-8B). These conclusions are correct, and further review is not warranted.

1. Petitioners argue (Pet. 6-13) that the closing of the Frankford Arsenal will have an impermissible racially discriminatory impact because the Illinois facility to which some of the Frankford Arsenal's work will be assigned has a smaller proportion of black employees. The court of appeals correctly characterized these "allegations * * * of racial discrimination * * * [as] 'so attenuated and unsubstantial as to be absolutely devoid of merit' " (Pet. App. 5B).[1] Moreover, even if the decision to close

[1]The court further stated (Pet. App. 5B):

> The closing of the Arsenal will deprive a group of persons, 82 percent of whom are white and 18 percent of whom are minority group members, of their jobs. It is patently frivolous to claim that an action uniformly affecting all members of an overwhelmingly white group is racially discriminatory. To adopt plaintiffs' argument would bar the Government from transferring activities whenever the transfer would adversely affect any minority employees. Effectively, plaintiffs' argument would prevent the transfer of Government functions from one locale to another. Such a claim is "obviously without merit." *Ex parte Poresky*, 290 U.S. 30, 32 (1933).

the arsenal could properly be viewed as a "personnel action" within the scope of 42 U.S.C. (Supp. V) 2000e-16(a),[2] the exclusive judicial remedy for the alleged discrimination would be a civil action under 42 U.S.C. (Supp. V) 2000e-16(c) by an aggrieved employee after exhaustion of his administrative remedies. *Brown* v. *General Services Administration*, No. 74-768, decided June 1, 1976. Since petitioners did not allege such exhaustion, the complaint was properly dismissed.

2. Petitioners also argue (Pet. 13-18) that the Secretary's decision to close the Frankford Arsenal is contrary to the Arsenal Act, 10 U.S.C. 4532.[3] They contend that the Act forbids the closing of any arsenal that is operating on an economical basis even if the Secretary concludes that it is unnecessary (Pet. 14). Although the contention is, in our view, plainly insubstantial, the court of appeals correctly declined to decide the question. It held that the Arsenal Act count of the complaint "fails to state a cause of action because there is no implied private right of action to enforce the essentially regulatory provisions of the Arsenal Act" (Pet. App. 6B). See *Cort* v. *Ash*, 422 U.S. 66.

[2]The district court held, correctly in our view, that "the complete closure of a military arsenal does not constitute a 'personnel action' within the terms of that statute" (Pet. App. 3C).

[3]The Act provides:

> (a) The Secretary of the Army shall have supplies needed for the Department of the Army made in factories or arsenals owned by the United States, so far as those factories or arsenals can make those supplies on an economical basis.
>
> (b) The Secretary may abolish any United States arsenal that he considers unnecessary.

Moreover, petitioners lack standing to challenge the arsenal's closing, because neither petitioner is arguably within the zone of interests protected by the Arsenal Act. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150. Indeed, there is no class of individuals for whose special benefit the Act was passed. The statute was intended not to protect employees of arsenals, but to enhance national security and protect the balance of payments by encouraging domestic manufacture of armaments. Since petitioners' only cognizable interest in enforcing the Arsenal Act is no more than that of the general public, they have no standing to challenge the decision to close the Frankford Arsenal. *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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